

Dinh (Migration) [2024] AATA 1162 (9 May 2024)

DECISION RECORD

DIVISION: Migration & Refugee Division

APPLICANT: Mrs Tieu Phuong Dinh

REPRESENTATIVE: Dr Le Ha Uyen Nguyen (MARN: 1384072)

CASE NUMBER: 1918494

HOME AFFAIRS REFERENCE(S): BCC2018/3976210

MEMBER: Stephen Conwell

DATE: 9 May 2024

PLACE OF DECISION: Perth

DECISION: The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner) visa:

- cl.820.211 of Schedule 2 to the Regulations
- cl.820.221(1) of Schedule 2 to the Regulations.

Statement made on 09 May 2024 at 9:49am

CATCHWORDS

MIGRATION – Partner (Temporary) (Class UK) visa – Subclass 820 (Partner) – genuine and continuing relationship – validly married – financial, household and social aspects of relationship and nature of commitment – age difference – limited finances because of applicant’s pregnancy and sponsor’s work injury – simple life with limited circle of family and friends – brief but credible evidence – decision under review remitted

LEGISLATION

Migration Act 1958 (Cth), ss 5F(2), 65
Migration Regulations 1994 (Cth), r 1.15A(3), Schedule 2, cl 820.211(2)(a), 820.221(1)

CASE

Li v Minister for Immigration [2007] FMCA 454

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Home Affairs to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s 65 of the *Migration Act 1958* (Cth) (the Act).
2. The applicant applied for the visa on 28 June 2018 on the basis of her relationship with her sponsor (the sponsor, Mr Chanh Phuong QUACH, previously Kevin Chen, previously Cheng-Fan KUO).
3. At that time, Class UK contained only one subclass: Subclass 820 (Partner). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the *Migration Regulations 1994* (Cth) (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
4. The delegate refused to grant the visa on the basis that the applicant did not satisfy cl.820.211 because the delegate was not satisfied that the applicant was the spouse of the sponsor at the time of application.
5. The applicant was represented in relation to the review by her registered migration agent (representative). The applicant provided a copy of the delegate's decision to the Tribunal for the purposes of the review.
6. As the applicant and sponsor (the parties) reside in New South Wales, they participated in the hearing by video-link on 7 May 2024 to give evidence and present arguments. The Tribunal also received oral evidence from Ms Thi Diem Chau NGUYEN, one of the applicant's two aunts living in Australia. The Tribunal hearing was conducted with the assistance of an interpreter in the Vietnamese and English languages. The representative and the interpreter both attended the Tribunal hearing by video-link.
7. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

8. *Background*

9. The applicant is a 30-year-old Vietnamese woman. The applicant and sponsor first met in April 2017 when the sponsor took some medicine and gifts from a friend (the applicant's aunt) to the applicant's grandmother in Vietnam. They spent time together until the sponsor returned to Australia on 15 April 2017. They maintained an online relationship until the applicant arrived in Australia for the first time on 11 December 2017 on a Tourist visa.
10. The parties married onshore on 25 December 2017. The applicant departed Australia on 7 January 2018 in compliance with her visa conditions.
11. In February 2018 the sponsor travelled to Vietnam for a traditional wedding ceremony with the applicant held on 12 March 2018.
12. On 24 May 2019 the applicant returned to Australia, remaining onshore for over three years until 27 July 2022. Since that time she has remained mainly onshore, departing for a few weeks to a month on a few occasions before returning onshore.
13. The applicant is expecting a child, due in July 2024. The parties refused a DNA test offered by the Tribunal due to financial constraints.

CONSIDERATION OF CLAIMS AND EVIDENCE

14. The issue in the present case is whether the parties are in a genuine and continuing spousal relationship.

Whether the parties are in a spouse or de facto relationship

15. Clauses 820.211(2)(a) and 820.221 require that at the time the visa application was made, and at the time of this decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the applicant claims to be the spouse of the sponsor who is an Australian citizen.
16. "Spouse" is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision.

Are the parties validly married?

17. The parties married in New South Wales on 25 December 2017 and have submitted a marriage certificate in evidence. On the basis of this evidence, the Tribunal accepts the parties are married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).

Are the other requirements for a spouse relationship met?

18. The Tribunal must consider all the circumstances of the relationship (including the matters specified in r.1.15A) in determining whether the parties are in a "married relationship" as defined by s.5F(2). Accordingly, this Tribunal has had regard to the parties' financial relationship; the nature of their household; the social aspects of the relationship; and the nature of their commitment to each other.
19. The Tribunal has had regard to the evidence provided relating to the financial aspects of the relationship, including joint ownership of assets, and joint liabilities; the extent of any pooling of financial resources, any legal obligations owed to the other party; any sharing of day-to-day household expenses. These include evidence of the parties' joint National Australia Bank (NAB) account, with the most recent statement being from 11 September to 10 October 2023. At the hearing the parties independently told the Tribunal that the joint account is their only bank account; they do not have personal bank accounts. The parties each confirmed that they do not have joint assets or liabilities; last year the applicant purchased a car in her name. She explained that she had bought the car online and it was easier to put the car solely in her name.
20. The parties told the Tribunal that the applicant has been the sole breadwinner, having worked in a nail salon since 2018. However as her pregnancy advanced, it was mutually agreed between her and her employer that she would stop work. The sponsor has not worked for several years after suffering a work accident for which he received a Work Cover payout. He receives no other benefits or pension. Currently he is working as an occasional driver for the nail salon which previously employed the applicant. He is paid \$250 in weekly wages. Since the applicant stopped work, this is their only source of income. After paying rent of \$150 a week, they have \$100 left for other living expenses.
21. Whilst there is no evidence of pooling of financial resources the Tribunal accepts this explanation of the parties' limited finances and financial arrangements; it gives this factor neutral weight with respect to the relationship.

22. The Tribunal has regard to the evidence provided relating to the nature of the parties' household, including any joint responsibility for the care and support of children, the parties' living arrangements and any sharing of housework.
23. The evidence shows that the parties initially lived with the applicant's aunt and her family from 2018 to May 2023 in the suburb of Bonnyrigg, New South Wales, where they shared one room as a couple. Since May 2023, the parties have lived in a 'granny flat at the back of a home in Cabramatta. In their separate testimony as well as in their joint written statement dated 26 March 2024, they describe their daily life and routine briefly, though with credibility.
24. With respect to the social aspects of their relationship, the parties testified that their wedding in Australia was attended by few people since the sponsor's family (his mother, older brother and three elder sisters) lives in Taiwan. Only the applicant's aunt and her family and a few friends attended the wedding in Australia. For the traditional wedding in Vietnam in March 2018, two of the sponsor's sisters travelled from Taiwan to Vietnam; apart from them the applicant's family and school friends made up the majority of guests.
25. There are also more recent photographs of the parties in family or social settings. The Tribunal asked the parties in the hearing why there is only limited evidence of the social aspects of their relationship, with the applicant's family members providing Form 888 witness statements and one of her aunts and a cousin attending the hearing. In reply the applicant stated that the parties live a simple life of working and spending time within a limited circle of family and friends. She stated that their friends are too busy working to take time to attend the Tribunal hearing. The applicant's aunt who testified as a witness spoke in general terms of knowing that the parties are in a genuine and ongoing marriage. The Tribunal gives limited weight to the witness's testimony and the written statements submitted by other family members.
26. The Tribunal notes evidence of communication between the parties in the form of phone logs, 'screen shots' and text messages. Apart from an occasional word or 'emoji', the transcripts are entirely in Vietnamese, with no accompanying English translation. In the hearing invitation, the parties are reminded of the need to have documents translated into English if they wished the Tribunal to place any weight on their content. The Tribunal is unable to know the content of these documents, however they do appear to show discussions of the prosaic elements of everyday life of life within a relationship. Nevertheless, the Tribunal has placed no weight on the untranslated transcripts and phone logs, as their content is unknown.
27. Given the limited impartial evidence regarding the social aspects of their relationship, the Tribunal gives this factor neutral weight.
28. The parties declined the Tribunal's invitation for the applicant to undergo DNA testing to determine the paternity of the unborn child. The parties' initially agreed to the request but later declined due to financial constraints. Having reviewed the parties' finances, the Tribunal accepts that with the applicant no longer working due to her pregnancy, the parties' finances are severely curtailed. Having had the opportunity to assess the parties' credibility, the Tribunal is prepared to accept this explanation. It also recognises that the paternity of the child is not at issue, but rather whether the parties are in a genuine and continuing spousal relationship.
29. The Tribunal did question each of the parties as to the 23 year age gap between them. The applicant stated that it has never been an issue for them; she is not troubled by the sponsor being much older than her. On balance the Tribunal found the parties to be credible witnesses. It therefore accepts this explanation and much of their other testimony.
30. Whilst the parties have submitted limited evidence in support of the reg.1.15A factors, the Tribunal is mindful that each of the matters in r.1.15A(3) are not 'criteria' which must be 'met'. See *Li v Minister for Immigration* [2007] FMCA 454, Riley FM at [70]–[72].

31. Having considered the evidence, the Tribunal finds that the parties' becoming parents supports other evidence as to the nature of their household, social aspects of their relationship, nature of their commitment to each other, and all the other circumstances of the relationship to demonstrate that they are in a genuine spousal relationship: r.1.15A(3).
32. The Tribunal finds that the applicant and sponsor have a mutual commitment to a shared life to the exclusion of all others, are in a genuine and continuing relationship, and live together as a family after the birth of their child. They therefore meet all the requirements in s.5F(2) (b), (c), and (d) of the Act.

33. *Conclusion*

34. On the basis of the above the Tribunal is satisfied that the requirements of s.5F(2) were met at the time the visa application was made. The parties' relationship was genuine and continuing, they had a commitment to a shared life together, and they lived together at the time of application. Therefore the applicant meets cl.820.211(2)(a).
35. The Tribunal is satisfied that the applicant was sponsored by the sponsor at the time of application as per cl.820.211(2)(c)(i). The Tribunal is also satisfied that the applicant was the holder of a substantive visa at the time of application and is therefore not subject to the requirements of cl.820.211(2)(d). Therefore, the applicant meets cl.820.211(2).
36. The applicant continues to meet the requirements of cl.820.211(2) at the time of decision. Therefore, she meets cl.820.221(1).
37. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 820 visa.

DECISION

38. The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner) visa:
 - cl.820.211 of Schedule 2 to the Regulations
 - cl.820.221(1) of Schedule 2 to the Regulations.

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Stephen Conwell
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).